

The Principle of Non-Refoulement as a Constitutional Right of Asylum Seekers in Turkey

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Selin Esen Di 26 Jul 2016

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Introduction

Refugee migration has always been a phenomenon for many countries in the modern age and Turkey is no exception. Since the 20th Century Turkey hosted hundreds of thousands of asylum seekers and refugees from different countries.

In an era of mass migration national constitutions are becoming one of the key factors for fulfilling commitments of countries to protect the rights of non-citizens within their borders. If a constitution recognizes some particular rights for asylum seekers and refugees as a vulnerable group it will provide them a stronger protection than the domestic law provides, because the recognition of asylum and refugee rights in the constitution will have a binding effect, i.e. be directly enforceable to individuals and be protected by courts as a constitutional norm.

In this regard, the right to seek asylum is an important right for asylum seekers as a vulnerable group, because it guarantees their right to life, liberty and security in an absolute way by allowing them to remain, not expelling them, refusing to extradite and not prosecuting them or restricting their liberty. This defines the principle of non-refoulement- the prohibition of forced removal. This is a cornerstone of the legal concept of asylum. The prohibition of forced removal implies that "states are obliged not to return a person to his or her country of origin, or any other country for that matter, where he/she has a risk of being subjected to serious harm".ⁱ Thus, the right to seek asylum and the principle of non-refoulement are key elements for asylum seekers in order to enjoy their other basic rights.

The Principle of Non-refoulement in Constitutions

The right to seek asylum and the principle of non-refoulement are recognized by several international human rights treaties written following WWII, such as 1951 Convention relating to the Status of Refugees (Art 33) and its 1967 Protocol (Art 1.1). The ECHR neither enshrines a right to asylum, a right to stay in the contracting state or a right to subsidiary protection, nor explicitly refers to non-refoulement. But the ECtHR has, ever since the case of *Soering v. the United Kingdom*, consistently interpreted the principle of non-refoulement to be implied in Article 3 of the ECHR regarding the prohibition of torture and inhuman or degrading treatment or punishment.ⁱⁱ

Eventhough the right of asylum and the principle of non-refoulement are widely recognized in international law, in the beginning, their inclusion in the constitutions was not very common. France, Italy, and Germany are pioneer European countries that specifically guarantee the right of asylum or the principle of non-refoulement in their national Constitutions. Some of the newly written European constitutions, such as the Portuguese, Spanish, Polish, Slovakian, and Swiss also recognize the right of asylum or the principle of non-refoulement. Constitutionalisation of the right of asylum or the principle of non-refoulement is also prevelant in other continents, i.e. Latin America and Africa.<http://www.unhcr.org/50e6d9a69.pdf> We may claim that the right of asylum and the principle of non-refoulement as its component are increasingly constitutionalized.

The Principle of non-refoulement in the 1982 Constitution of Turkey

The 1982 Constitution does not recognize the right of asylum or the principle of non-refoulement *per se*. Nevertheless, we may find a constitutional basis for the rights of asylum seekers including the principle of non-refoulement. Above all, Article 17.1 gurantees to everyone the right to life and the right to protect and develop his/her material and spiritual entity. Yet, no one shall be subjected to torture or ill-treatment; or to penalties or treatment incompatible with human dignity (Art. 17.3). Also Article 5 imposes the state an obligation to provide the conditions required for the development of the individual's material and spiritual existence and obliges the

state to remove all sorts of obstacles in exercising rights of individuals. Yet, the TCC establishes a relationship between the right to life, the right to protect and develop his/her material and spiritual entity and human dignity. According to the Court, the right to develop his/her material and spiritual entity provides protection of human dignity (e.g. see TCC E. 2007/98, K. 2010/33, 4 February 2010, Official Gazette 18 May 2010-27585; E. 2012/7, K. 2012/102, 5 July 2012, Official Gazette 6 October 2012-28433; E.2013/137, K.2014/94, 22 May 2014, Official Gazette 12 September 2014-29117). This indicates that the Court deems the human dignity as a fundamental value. Hence, Article 17 of the Constitution and its understanding by the TCC can facilitate the concept of human dignity to be a constitutional source of non-enumerated rights that are recognized as part of a democratic society,<http://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1681&context=iclr> including the right of asylum and the principle of non-refoulement. Human dignity can also play an important part to interpret constitutional rights in favor of asylum seekers and refugees.

Article 10 of the Constitution guarantees all individuals equality without any discrimination before the law, irrespective of language, race, color, sex, political opinion, philosophical belief, religion and sect, or any such considerations. Yet, the Constitution guarantees some rights and freedoms e.g. life, liberty and security etc. to “everyone” without making distinction between citizen and alien. Hence, considering Article 10, alienage *per se* is not a permissible ground for different treatment in the 1982 Constitution.

However there are also some specific limitations for foreigners stipulated in the Constitution. The Constitution does not recognize some fundamental rights and freedoms to aliens that are particularly confined to the citizens, which are mainly political rights. Also some rights are recognized to aliens with certain limitations, such as the right to petition (Art 74).

On the other hand, Article 16 of the Constitution provides a specific guaranty for aliens. Accordingly, the fundamental rights and freedoms of foreigners may be restricted by law in a manner consistent with international law. Since Article 16 refers “international law” we should explain briefly the place of international law in Turkish domestic law. According to Article 90.5 of the Constitution, international agreements duly put into effect have the force of law. This paragraph also stipulates priority of international agreements duly put into effect regarding basic rights and freedoms over domestic law, should there is a difference in provisions between an international agreement and a domestic law on the same matter.

Turkey is part of the international human rights systems. It ratified major international human rights documents, such as the 1951 Convention and its 1967 Protocol with a geographical limitation, and the ECHR. Accordingly, we may claim that Article 90.5 of the Constitution provides a significant constitutional guarantee for asylum seekers and refugees together with Article 16.

Statutory Framework of Asylum Seekers in Turkey

For a long time Turkey did not provide a comprehensive legislation concerning asylum seekers and refugees. In order to meet growing criticism coming from the ECtHR and the European institutions, and the necessities resulting from the increase of mass influx of asylum seekers from Syria as of 2011, the Parliament enacted Law No. 6458 on Foreigners and International Protection (LFIP) in 2013 (Official Gazette 11 April 2013-28615) that came into force in 11 April 2014. Today, this legislation forms the basis of asylum legislation in Turkey.

The LFIP has brought some landmark changes in order to provide integration of immigrants and to treat asylum seekers and irregular migrants in accordance with the international standards.ⁱⁱⁱ Indeed, it redesigns international protection in consonance with the international human rights standards. To give an example, in order to accord with the EU legislation, in addition to refugee and conditional refugee statuses, the LFIP introduces “international protection” also for aliens and stateless persons who are not qualified as a refugee or a conditional refugee, but have a justifiable fear to return to the country of origin or country of [former] habitual residence (Art 63).

According to the LFIP, when assessing an application for international protection, the Turkish government primarily will consider whether “the applicant has arrived from a safe third country” (Art 74.1,2.a-c). Generally, an individual arriving from home country or a third country that is not safe will be eligible for international protection in Turkey (Art 85.1.d). The LFIP also provides temporary protection for the first time in the mass influx situations

(Art 91). Introduction of the „temporary protection status“ into the Turkish law will furnish to implement the principle of non-refoulement effectively in a mass influx situation.

Article 4 of the LFIP recognizes unreservedly the principle of non-refoulement. Differently from the 1951 Convention, under Article 4, the principle of non-refoulement not only covers refugees but also others who enjoy international protection, and other aliens who entered into Turkey legally or illegally. Yet, on the contrary to the 1951 Convention, Article 4 does not stipulate any exception clause. Accordingly, this provision is consistent with the standards set by the ECtHR.^{iv}

The LFIP provides some rules regarding aliens exempted from deportation and deportation procedure. Article 55 enlists categories of foreigners who will not be deported, including those who will likely be subjected to the death penalty, torture, cruel or degrading treatment or punishment in the country to which they will be deported, whose travel are considered risky due to a serious health problem, age, or pregnancy, who cannot continue treatment for a life-threatening health problem in the country to which they will be deported, who are victims of human trafficking benefitting from a victim support process, or who are at the time being treated as victims of psychological, physical, or sexual violence. It seems that the Parliament took the ECtHR case-law and the EU law into consideration drafting this provision (see the cases of *D v. the United Kingdom*, Appl. 30240/96, 2 May 1997; *N. v. the United Kingdom*, Appl.26565/05, 27 May 2008). Also, stateless persons holding a Stateless Person Identification Document shall not be deported unless they pose a serious threat to public order or public security (Art 51.1.b). Applicants or international protection beneficiaries can be removed only when there are serious reasons to believe that they pose a threat to national security or if they have been convicted upon a final decision for an offence constituting a threat to public order (Art 54.2).

Article 53 provides significant procedural guarantees for the person against whom a deportation decision is issued. Accordingly, without prejudice to the alien's consent, alien shall not be removed during the judicial appeal period or until the finalisation of the appeal proceedings. We may claim that this provision provides a broader protection in the field of asylum than the Constitution. Indeed, according the Constitution (Art 125.5), a court may decide a stay of execution only if the implementation of an administrative act should result in damages which are difficult or impossible to compensate for, and at the same time this act is clearly unlawful.

As a result, procedural guarantees, including automatic suspensive effect provided by the LFIP meets the ECtHR standards (see cases of *Keshmiri v. Turkey*, Appl.36370/08, [fin] 13.07.2012; *Abdolkhani ve Karimnia v. Turkey* App. 30471/08, 22 September 2009; *M.B. and Others v. Turkey*, Appl.36009/08, 15 June 2010; *Dbouba v. Turkey*, Appl. 15916/09, [fin] 13 October 2010; *Ghorbanov and Others v. Turkey*, Appl. 28127/09, [fin] 3 March 2014). Also under the LFIP the principle of non-refoulement also provides a security for aliens in matters regarding entry into Turkey (Art 8).

Decisions of the TCC

Up to date, the TCC have disposed a few number of applications regarding violation of the principle of non-refoulement through the constitutional complaint. The Court deems that the infringement of the prohibition of forced removal will breach Article 17 that protects the right to life and material and spiritual integrity of the individual and Article 19 that guarantees personal liberty and security. According to the Court, if removal of a person to his/her country will clearly cause a peril on his/her life or material and spiritual integrity, it will infringe Article 17 and Article 19 of the Constitution (see cases of *Farah Abdulhamed Mohammed Ali Al-Mudhafa r*, App. 2015/13854, 14 August 2015; *Z.M. and I.M.*, App. 2015/2037, 6 January 2016, Official Gazette 11 March 2016-29650, para 34).

The TCC assesses applications claiming violation of the principle of non-refoulement in accordance with Article 73 of the Internal Regulation of the TCC Article 73 provides the Court to take interim measure if it considers that an administrative or judicial decision will cause a serious danger towards the life or material and spiritual integrity of the applicant. While deciding to take interim measure requests regarding deportation actions, following the ECtHR precedent^v the TCC takes into consideration some matters such as general situation of the country that the applicant will be extradited, personal history of the applicant, actualness and personally of the risk that the applicant is facing. (see cases of *Ahmed Diini*, App. 2014/19506, interim measure, para 21; *Mohammad Abdul*

Khaliq, para 25; *Majid Mahmood Ahmed Aljamal*, paras 14-16).

In cases against removal actions, similar to the rulings of the ECtHR^{vi}, the Court examines circumstances in the relevant country *sua sponte*. While assessing whether the relevant country violates human rights systematically, the TCC does not only depend on documents and information submitted by the applicant, but also takes into account reliable international and national reports on human rights (see cases of *Majid Mahmood Ahmed Aljamal*, para 14; *Oyatullo Kurbonov and Others*, App. 2016/10071, 31 May 2016, para 22; *Eiza Kashkoeva*, App. 2016/9483, 25 May 2016, para 17).

Ultimately, we may claim that the TCC generally follows the ECtHR precedents in cases regarding the principle of non-refoulement. However, I note that the Court has not shown a tendency to go beyond the ECtHR case-law and when an opportunity arises which would broaden the scope of the rights in the field of asylum in Turkey. In some cases instead of embracing broader approach, the Court observes the narrow interpretation of the ECtHR. To give an example, Article 36.1 of the Constitution stipulates that, „Everyone has the right of litigation either as plaintiff or defendant and the right to a fair trial before the courts through lawful means and procedures“. Article 6.1 of the Convention delimits the scope of the right to a fair trial with „the determination of his/her civil rights and obligations or of any criminal charge against him/her“. According to the TCC, the scope and nature of „the right to a fair trial“ in Article 36 must be defined in accordance with Article 6 of the ECHR (see cases of *Onurhan Solmaz*, App. 2012/1049, 26 March 2013, para 22; *Z.M. and I.M.* App. 2015/2037, 19 February 2015, para 59-60) and also the relevant ECtHR case-law must be taken into consideration (case of *Z.M. and I.M.*, para 61). According to the TCC, proceedings concerning disputes on deportation actions of foreigners remain outside the protection of both Article 36.1 of the Constitution and Article 6.1 of the ECHR, because the ECtHR considers actions and proceedings regarding the entry, residence and removal of aliens remain outside the ambit of Article 6.1 of the Convention (case of *Z.M. and I.M.*, para 62-63).

The Court's approach on this issue raises criticism, because it fails to read the content of Article 36.1 of the Constitution broader than the Convention.^{vii} Indeed, differently from Article 6.1 of the ECHR, Article 36.1 of the Constitution recognizes the right to a fair trial to „everybody“ without excluding any group or person, including alien. Besides, while defining the scope of the right to a fair trial in accordance with Article 6.1 of the Convention the ECtHR rulings, the Court disregards Article 53 of the ECHR stipulates that „Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party“. ^{viii} Yet, the Court's approach contradicts with the principle of *pro homine* that requires the interpretation of human rights norms in such a way to restrict them as little as possible.

Conclusion

Turkey has not enacted a comprehensive legislation for many years regarding the rights of asylum seekers and refugees that complies with the international human rights standards. However, multiple ECtHR decisions regarding asylum matters against Turkey and ongoing Syrian refugee crisis since 2011 required the Government to overhaul its immigration system. Besides amending legislation in accordance with the international standards, the TCC rulings generally has improved the level of the protection of rights of the asylum seekers, particularly on enjoyment of the principle of non-refoulement.

i P. Boeles, M. den Heijer, G. Lodder, K. Wouters (2009), *European Migration Law*, 1st Ed., Intersentia Publishers, Berlin, p. 253.

ii V. Flegar (2016), „Vulnerability and the Principle of Nonrefoulement in the European Court of Human Rights: Towards an Increased Scope of Protection for Persons Fleeing from Extreme Poverty?“, *Contemporary Readings in Law and Social Justice* 8(2) p. 151.

iii E. Dardağan Kibar, „An Overview and Discussion of New Turkish Law on Foreigners and International Protection“, *Perceptions*, XVIII(3), 2013, pp. 109-110; A. İçduygu, *Syrian Refugee in Turkey: The Long Road Ahead*, 2015, Washington DC: Migration Policy Institute, p. 6.

iv C. Ovey and R. White, *The European Convention on Human Rights*, Fourth Edition, Oxford University Press, 2006, p. 104.

v *Ibid.* p. 104,

vi *Ibid.*

vii B. E. ODER, “Anayasa Mahkemesi’ne Bireysel Başvuruda İlk Evre: Sınırlar, Sorunlar ve Yeni İçtihat”, *Güncel Hukuk*, Yıl 9, Sayı 117, 2013, s. 18.

viii E. Kontacı, „Anayasa Mahkemesi’ne Bireysel Başvuruda Avrupa İnsan Hakları Sözleşmesi’nin Yorumu“, *Ankara Barosu Dergisi*, 4, 2014, p. 115.

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